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No. 82-1776

In the Supreme Court of the United States

OCTOBER TERM, 1982

S. J. GROVES & SONS COMPANY,
a corporation,

Appellant,

v.

THE STATE OF ILLINOIS, Acting through its Division of Highways of the Department of Transportation,

Appellee.

On Appeal From The Supreme Court Of Illinois

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the due process and the taking clauses of the fifth and fourteenth amendments to the United States Constitution are violated because Illinois, having waived sovereign immunity in its constitution, fails to provide for any judicial evaluation or binding resolution of contract claims against the state.

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NO.

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THE STATE OF ILLINOIS, Acting through its Division of Highways of the Department of Transportation,

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On Appeal From The Supreme Court Of Illinois

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The order of the Circuit Court of the Tenth Judicial Circuit of Illinois, Peoria County, is reproduced in the Appendix. (App. at 1a.) The opinion of the Appellate Court of Illinois, Third District, is reported at 103 Ill. App. 3d 538, 431 N.E.2d 716 (1982). (App. at 3a-10a.) The opinion of the Supreme Court of Illinois is reported at 93 Ill. 2d 397, 444 N.E.2d 131 (1983). (App. at 11a-20a.) The order of the Supreme Court of Illinois denying rehearing is reproduced in the Appendix. (App. at 21a.)

JURISDICTION

The order of the Supreme Court of Illinois denying rehearing (App. at 21a) was entered on January 28, 1983, and a notice of appeal to this Court (App. at 22a) was filed in the Supreme Court of Illinois on April 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The fifth and fourteenth amendments to the Constitution of the United States, U.S. Const. Amend. V, Amend. XIV, § 1; the Illinois Constitution, Ill. Const. art. XIII, § 4 (1970); and Illinois statutes, Ill. Rev. Stat. ch. 37, par. 439 et seq., ch. 127, par. 801 and ch. 121, par. 4-201.4 (1979), are involved in this case. They are reproduced in relevant part in the Appendix. (App. at 23a-24a.)

STATEMENT

The appellant, S. J. Groves & Sons Company,[1] a Minnesota corporation, was the successful bidder on an Illinois public highway project for construction of a portion of Interstate Highway 474. (Complaint ¶¶ 4, 13.) The 10 million dollar contract with the Division of Highways of the Illinois Department of Transportation was signed on May 24, 1977. (Complaint ¶ 14.) After appellant had commenced construction, the Department of Transporta-

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[1] The caption of this case contains the names of all the parties below. In addition, the following *amici curiae* supported the arguments of S. J. Groves & Sons Company before the Illinois Supreme Court: the Illinois Chamber of Commerce, Southern Illinois Builders Association, Associated General Contractors of Illinois, and Pensoneau Excavating Company.

tion unilaterally altered certain terms and provisions of the contract, requiring appellant to perform "extra work" as defined by the contract. (Complaint ¶¶ 17-19.) Appellant continued to perform the services and to provide the materials required in the contract as altered. In 1977, appellant also timely notified the Department of Transportation of its claims for $83,394.16 for the extra work. (Complaint ¶¶ 18, 19, 13, 24.) In 1978, the Department of Transportation denied appellant's request for additional compensation. (Complaint ¶ 22.) In 1981, the Department of Transportation denied appellant's request for reconsideration. (Complaint ¶ 26.)

The merits of appellant's claim have never been addressed by any court. The question that has been presented at each stage of this litigation is whether, having waived sovereign immunity in its constitution, the State of Illinois can deny the appellant any binding judicial resolution of its contract claim against the state without violating the Illinois Constitution and the fifth and fourteenth amendments to the United States Constitution.

Proceedings in the Trial Court

In 1981, appellant filed suit in the Circuit Court of the Tenth Judicial Circuit, Illinois, Peoria County, for breach of contract and a declaratory judgment that the Illinois Court of Claims Act, Ill. Rev. Stat. ch. 37, par. 439.1-439.25 (1979), is invalid under both the Illinois and the United States constitutions.

Appellant asserted in the Circuit Court, and the Appellate Court of Illinois subsequently acknowledged (App. at 6a), that the Illinois court of claims is not a court at all. It most nearly resembles a committee of the legislature. Although it is an administrative agency, there is no review of its decisions by any court. Its recommendations are in

no sense binding. An award is simply a condition precedent to petitioning the legislature for an appropriation. (*Id.*) If granted, appropriations are subject to veto by the governor.[2]

Appellant's complaint challenged the failure to provide a judicial forum and lack of binding resolution as violations of the Illinois Constitution and the due process and taking clauses of the fifth and fourteenth amendments to the United States Constitution. (Complaint ¶¶ 28-29.)

Appellant also contended that the court should construe the statutory grant of authority to contract for construction of highways, given to the State in Ill. Rev. Stat. ch. 121, par. 4-201.4 (1979), App. at 24a, as legislative consent to contract suits against Illinois in courts of law. (Complaint ¶ 29(b).)

The trial court dismissed the complaint (App. at 1a-2a), holding that:

> Article XIII, Section 4 of the Illinois Constitution of 1970, Ill. Rev. Stat. ch. 127, par. 801, and Ill. Rev. Stat. ch. 37, par. 439.1 through 439.24-9 bar jurisdiction of the cause in this Court.
>
> The Court also finds that the above-cited constitutional provision and statutory enactments do not offend any provisions of the Constitutions of the State of Illinois or the United States.

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[2] Such vetoes do in fact occur based on such criteria as the executive's views about the enforceability of a contract, a traditionally judicial issue, or upon resolution of other legal issues which may or may not have been presented to and resolved by the court of claims. The governor of Illinois recently has vetoed, among other appropriations for court of claims awards, an award of $47,707 on the ground that the "contract must have first been authorized by the Governor." S. Bill 1678, 82nd Ill. Gen. Ass., 1982 Sess. Vol. I, 597.

Proceedings in The Appellate Court of Illinois

On appeal to the Appellate Court of Illinois the constitutional issues again were raised. The trial court's ruling was reversed. (App. at 3a-7a.) The appellate court found the statutory scheme to be "fundamentally faulty" because it failed to require judicial review or binding resolution and placed unequal burdens on the private contractor, who could be sued in court by the state. (App. at 6a-7a.) In light of these constitutional infirmities, the court ruled that Illinois had implicitly consented to suit when it entered into the contract with appellant. (App. at 5a-6a.)

Proceedings in the Supreme Court of Illinois

The Supreme Court of Illinois reversed, rejecting the holding that the legislature implicitly had consented to suit on contracts voluntarily entered into by the state. (App. at 11a-20a.) It further rejected the appellant's contention that the Illinois Court of Claims Act violated the United States Constitution's prohibition against takings without just compensation and the requirements of due process. On January 28, 1983, the Supreme Court denied appellant's petition for rehearing. (App. at 21a.)

THE QUESTION IS SUBSTANTIAL

This case presents an important issue of first impression before this Court: whether a state, having waived sovereign immunity, constitutionally may commit the resolution of contract disputes with the state to a body which cannot render binding judgments, is not a judicial body, and from which no judicial appeal is permitted. This is a fundamental constitutional issue regarding the construction of the fifth amendment prohibition against taking without just compensation, as applied to the states through the fourteenth amendment, as well as the fifth and fourteenth amendments' requirements of due process.

The question here presented affects the rights of literally all persons and corporations who contract to provide the State of Illinois with hundreds of millions of dollars worth of materials and services each year. It may also have a direct impact on the law of several other states.[3]

Illinois has taken a position unique among the fifty states, most of which have acknowledged and dealt with the issue presented by this case. While waiving sovereign immunity, Illinois has failed to recognize that the taking clause applies to contracts and, together with the due process clause, requires that just compensation of disputed claims for materials or services taken by the state be determined by binding judicial resolution.

Almost all of the states have recognized that an issue of fundamental fairness is presented when an individual seeks recompense for property or services rendered pursuant to a contract into which the state has voluntarily

[3] See n.6, *infra*.

entered. Thirty-six states have expressly provided, by statute or case law, that contract claims against the state may be brought in the state trial courts.[4] Eight states

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[4] Alaska Stat. § 9.50.250 (1973); Ariz. Rev. Stat. § 12-821 (1956); Cal. Code § 955 (1963); Colorado—*Ace Flying Service, Inc.* v. *Colorado Dep't of Agriculture*, 136 Colo. 19, 314 P.2d 278 (1957); Conn. Gen. Stat. Ann., § 4.61 (1980); Delaware—*George & Lynch Construction, Inc.* v. *Delaware*, 197 A.2d 734 (1964); Fla. Stat. Ann. ¶ 337.19 (1982); Georgia—*Regents of University System of Georgia* v. *Blanton*, 49 Ga. App. 602, 176 S.E. 673 (1934); Hawaii—*York* v. *State*, 53 Hawaii 557, 498 P.2d 644 (1972); Idaho—*Grant Construction Co.* v. *Burns*, 92 Idaho 408, 443 P.2d 1005 (1968); Indiana—Ind. Code Ann. § 34-4-16-1 (West 1982); Iowa—*Kersten Co.* v. *Dep't of Social Services*, 207 N.W.2d 117 (1973); Kansas—*Shapiro* v. *Kansas Public Employees Retirement System*, 216 Kan. 353, 532 P.2d 1081 (1975); La. Const., art. XII, § 10 (1974); Massachusetts—*State Line Contractors* v. *Commonwealth*, 356 Mass. 306, 249 N.E.2d 619 (1969); Mass. Ann. Laws ch. 258, § 2 (1978); Minn. Stat. Ann. § 3.751 (1975); Miss. Code Ann. § 11-45-1 (1972); Missouri—*DiCarlo Construction Co.* v. *State*, 485 S.W.2d 52 (1972); Montana—*Meens* v. *State Board of Education*, 127 Mont. 515, 267 P.2d 981 (1954); Nebraska—*Todd* v. *Board of Educational Lands and Funds of Nebraska*, 154 Neb. 606, 48 N.W.2d 706 (1951); Nevada—Nev. Rev. Stat. §§ 41.010, 41.031 (1981); N. H. Rev. Stat. Ann. § 491:8 (1955); New Jersey—*P.T. & L. Construction Co.* v. *Comm'r, Dep't of Transportation*, 60 N.J. 308, 288 A.2d 574 (1972); New Mexico—N. M. Stat. Ann. § 37-1-23 (1978); North Carolina—*Smith* v. *State*, 289 N.C. 303, 222 S.E.2d 412 (1976); N.D. Cent. Code § 32-12-02 (1981); Oklahoma—*State Board of Public Affairs* v. *Principal Funding Corp.*, 542 P.2d 503 (1975); Or. Rev. Stat. § 30.320 (1981); South Carolina—*Kinsey Construction Co.* v. *South Carolina Dep't of Mental Health*, 272 S.C. 168, 249 S.E.2d 900 (1978); Tenn. Code Ann. § 29-10-101 (1980); Utah—*Thorn Construction Company* v. *Utah Dep't of Transportation*, 598 P.2d 365 (1979); the Texas legislature provides that it will consent to each suit brought on contract against the state, Tex. S. Res. 51, 58th Leg., 1963 Tex. Sess. Law. p. 1714; Va. Code § 8.01-192 (1977); Washington—*Architectural Woods* v. *State*, 92 Wash. 2d 521, 598 P.2d 1372 (1979); Wis. Stat. Ann. § 775.01 (West 1981); Wyo. Stat. § 24-2-101 (1977).

have administrative agencies, courts of claims, or arbitrators which hear claims in the first instance and permit appeal to the state courts.[5] In each of these cases, the arbitrators, administrative boards, or courts of claims may enter binding orders.

Only six states invoke some form of immunity to suits on their contracts by limiting either the binding nature of judgments or the ability to sue the state in courts of law.[6] Of the six states, only Illinois maintains this kind of system despite its constitutional provision that: "[e]xcept as the General Assembly may provide by law, sovereign immunity in this state is abolished." Ill. Const. art. XIII, § 4 (1970), App. at 23a.

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[5] There are administrative boards in Kentucky, Maryland, Pennsylvania and Vermont. Ky. Rev. Stat. § 44.140 (1981), Md. Ann. Code art. 21 § 7-201, 202 (1981); Pa. Stat. Ann. ch. 72 § 4651, 4651-10 (Purdon 1978); Pa. Const. art. I, § 11 (1969); Vt. Stat. Ann. tit. 3, § 3104(c) (1977). There are courts of claims in Michigan, New York and Ohio. Mich. Comp. Laws Ann. § 600.6419 et seq. (1979); N.Y. Ct. Cl. Act § 1 et seq. (1980); Ohio Rev. Code Ann. § 2743 et seq. (1981). Rhode Island mandates arbitration of all contract claims arising out of state contracts and appeal from the arbitration to the courts is permitted. R.I. Gen. Laws § 37-16-2 (1956).

[6] West Virginia, Alabama, and Arkansas have constitutional prohibitions against suing the state. W. Va. Const. art. VI, § 35 (1982) (administrative claims agency with no review or binding decision); Ala. Const. art. I, § 14; Ark. Const. art. V, § 20 (claims commission with no judicial review or binding judgment, Ark. Stat. Ann. § 13-1401 (1947)). South Dakota permits suit only if the legislature has already appropriated funds. S.D. Cod. Laws § 21-32-10 (1982), otherwise a circuit judge acts as a claims commissioner and makes recommendations to the legislature. S.D. Cod. Laws § 21-32-7 (1979). Maine requires legislative approval before suit may be brought; but the Maine Supreme Court has indicated that it may accept the implied consent analysis for contract claims. *Drake* v. *Smith*, 390 A.2d 541 (1978). Illinois is the sixth state.

Not only is Illinois law an aberration, but the decision of the Supreme Court of Illinois that this scheme withstands constitutional scrutiny is in direct conflict with the Supreme Court of Idaho.

In *Grant Construction Co.* v. *Burns*, 92 Idaho 408, 443 P.2d 1005, 1010 (1968), the Supreme Court of Idaho held that denying the right to sue deprived the contracting party of property without due process of law. It ruled that where the state entered into a contract pursuant to legislative authorization, the state had, as a matter of law, consented to be sued for alleged breaches of its contractual responsibilities and could not invoke the protection of sovereign immunity.

This rationale is further supported by the New Jersey Supreme Court's observation that if it is less than a "taking" when the state unilaterally declares a claim is without merit, and simultaneously refuses to provide a forum where the dispute may be adjudged as of right according to the law, then "surely precious little remains of the constitutional promise." *P. T. & L. Construction Co.* v. *Comm'r, Dep't. of Transportation*, 60 N.J. 308, 313-14 n.1, 288 A.2d 574, 577 n.1 (1972).

This Court has not so minimized the constitutional promise. In *Lynch* v. *United States*, 292 U.S. 571, 579 (1934), Justice Brandeis wrote for the Court: "[t]he Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States."

The taking prohibition of the fifth amendment applies to the states through the fourteenth amendment. *Chicago, Burlington and Quincy R. R. Co.* v. *Chicago*, 166 U.S. 226 (1897) (appeal from the Supreme Court of Illinois). In

the C. B. & Q. case, this Court, citing *Davidson* v. *New Orleans*, 96 U.S. 97, 102 (1878), suggested that if due process of law is to be a meaningful protection of private rights, it cannot mean that the states may define due process by legislation. 166 U.S. at 235. The Court held that due process of law "as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public." 166 U.S. at 236. The Court reiterated the proposition that a condition precedent to the exercise of the power to take property is the provision for reasonable compensation. *Id.* at 238.

In *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327 (1893), this Court held that the question of what constitutes just compensation is exclusively a judicial question:

> It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, *and the ascertainment of that is a judicial inquiry.*" (Emphasis supplied)

This holding was reaffirmed in *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287, 291 (1920). *See also Glidden Co.* v. *Zdanok*, 370 U.S. 530, 549 n.21 (1962).

If the Illinois Constitution had not waived sovereign immunity, this Court would be faced squarely with the conflict between the doctrine of sovereign immunity and the constitutional prohibition against takings without just compensation. The cases cited above may well establish that a constitutionally required condition precedent to a

contractual undertaking by the state is consent to judicial determination of contract rights thereby established. It is difficult to imagine what remains of the fifth amendment's protection against the imposition of state needs on a single individual, if the state can deny any binding judicial resolution of that individual's rights. However, this conflict is not presented here, as Illinois has waived sovereign immunity except "as the General Assembly may provide."

Even if Illinois may select the type of remedy it will provide, it may not deny judicial relief and thus annul the contract. Illinois not only affords both its legislature and its governor the power to ignore the judgment of the administrative arbiter, it denies to private claimants judicial review of the criteria employed to determine what compensation is just. Illinois empowers its executive, without benefit of argument or briefs, to veto awards for any reason, including his judgment about the legal validity of the underlying contracts. See n.2, *supra.*

In light of Illinois' constitutional waiver of sovereign immunity, it cannot deny a judicial forum for determining what constitutes just compensation for claims on contracts voluntarily entered into by the state. The Illinois Supreme Court failed to recognize the fundamental constitutional protections which require an opportunity for binding judicial resolution or review of contract claims; plenary review by this Court is warranted.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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Dated: April 28, 1983

APPENDIX

IN THE CIRCUIT COURT OF THE TENTH
JUDICIAL CIRCUIT OF ILLINOIS
PEORIA COUNTY

S. J. GROVES & SONS COMPANY,
a corporation,

v. Case No. 81 MR 0838

THE STATE OF ILLINOIS, ACTING
THROUGH ITS DIVISION OF HIGHWAYS
OF THE DEPARTMENT OF
TRANSPORTATION,

ORDER

This cause coming to be heard on Defendant's Motion to Dismiss, the Court having heard arguments of counsel in open court, and now being fully advised in the premises,

The Court finds that the Plaintiff has raised important issues of law involving the public interest;

The Court further finds that Article XIII, Section 4 of the Illinois Constitution of 1970, Ill. Rev. Stat. Chap. 127, Paragraph 801, and Ill. Rev. Stat. Chap. 37, Para. 439.1 through 439.24-9, bar jurisdiction of the cause in this Court;

The Court also finds that the above-cited constitutional provision and statutory enactments do not offend any provisions of the Constitutions of the State of Illinois or the United States;

The Court lacking jurisdiction of the cause, leave to replead is denied;

Therefore, it is Ordered and Adjudged that the cause be and hereby is DISMISSED.

Dated: June 4, 1981.

BY THE COURT:

/s/ C. W. Wilson
JUDGE OF THE CIRCUIT COURT

S. J. GROVES & SONS COMPANY, a Corporation, Plaintiff-Appellant,

v.

The STATE of Illinois, Acting through its Division of Highways of the Department of Transportation, Defendant-Appellee.

No. 81-349.

Appellate Court of Illinois, Third District.

Jan. 28, 1982.

Theodore T. Davis and Thomas C. Clark, Corporate Counsel, Minneapolis, Minn., for plaintiff-appellant.

Patricia Rosen, Asst. Atty. Gen., Chicago, for defendant-appellee.

HEIPLE, Justice:

Plaintiff Groves, a road contractor, brought suit against the State of Illinois in the circuit court of Peoria County for breach of contract. The State moved to dismiss on the grounds of sovereign immunity claiming that Groves' sole recourse is in the State Court of Claims. The trial judge granted the State's motion and dismissed the complaint. This appeal resulted. We reverse.

The question is not: Does sovereign immunity exist in the abstract? Of course it does. The concept of sovereign immunity in its various aspects has existed for hundreds of years. Neither the trial judge nor this court has

been asked to overturn the doctrine as a legal concept. Rather, the question presented is: Does sovereign immunity exist in this concrete situation? It is Groves' claim that the doctrine does not bar suit in this instance because the State has consented to be sued by entering into a validly authorized contract with plaintiff. We agree.

In order for a contract to exist at all, there must be mutuality. That means the contract must be enforceable by both contracting parties. The State's claim that they can sue on a contract but not be sued in return is untenable. Such assertion negates the existence of a contract since it posits a situation that would be utterly lacking in mutuality.

Statutory law authorizes the State to enter into contracts for the construction of highways. (Ill.Rev.Stat. 1979, ch. 121, §4-201.4.) That means binding contracts, not mere nudum pactums unenforceable by either party. When the State enters into a contract with a private party, it is acting in a business or proprietary capacity. In so doing, it lays aside whatever privilege of sovereign immunity it otherwise possesses and binds itself to performance, just as any private citizen would do by so contracting. Just as certainly as the State expects faithful performance and fair dealing from the other contracting party, so too must the State meet its obligations. The State can and does seek redress in the courts to enforce contracts against others. That recourse is mutual. To hold otherwise would be to ascribe bad faith and shoddy dealing to the State.

As was so cogently put by the Supreme Court of Indiana in 1891:

> "In entering into the contract it (the state) laid aside its attributes as a sovereign, and bound itself

> substantially as one of its citizens does when he enters into a contract. Its contracts are interpreted as the contracts of individuals are, and the law which measures individual rights and responsibilities measures, with few exceptions, those of a state whenever it enters into an ordinary business contract * * *. The principal that a state, in entering into a contract, binds itself substantially as an individual does under similar circumstances, necessarily carries with it the inseparable and subsidiary rule that it abrogates the power to annul or impair its own contract. It cannot be true that a state is bound by a contract, and yet be true that it has power to cast off its obligations and break its faith, since that would invoke the manifest contradiction that a state is bound and yet not bound by its obligation. * * *'' (*Carr* v. *State* (1891), 127 Ind. 204, 26 N.E. 778, 779.)

In accord, South Carolina: 1978, *Kinsey Construction Co.* v. *South Carolina,* 249 S.E.2d 900; Oklahoma: 1975; *State Board of Public Affairs* v. *Principal Funding Corp.,* 542 P.2d 503; North Carolina: 1976, *Smith* v. *State,* 289 N.C. 303, 222 S.E.2d 412; Iowa: 1973; *Kersten Company* v. *Dept. of Social Services,* 207 N.W.2d 117; Missouri: 1972; *DiCarlo Construction Co.* v. *State,* 485 S.W.2d 52; New Jersey: 1972; *PTL Construction Co.* v. *Dept. of Transportation,* 288 A.2d 574; Kentucky: 1960, *Humphreys* v. *J. B. Michael Co.,* 341 S.W.2d 229; Idaho: 1968; *Grant Construction Co.* v. *Burns,* 443 P.2d 1005; Delaware: 1964; *George & Lynch Construction, Inc.* v. *Delaware,* 197 A.2d 734; California: 1962; *Souza & McCue Construction Co.* v. *Superior Court,* 20 Cal.Rptr. 634, 370 P.2d 338; Colorado: 1957; *Ace Flying Service* v. *State,* 314 P.2d 278; Montana: 1954; *Meens* v. *State Board of Education,* 267 P.2d 981; Georgia: 1934; *Regents of Georgia* v. *Blanton,* 176 S.E. 673; Michigan: 1943; *Hersey Gravel Co.* v. *State Highway Commission,* 305 Mich. 333, 9 N.W.2d 567.

The Illinois cases cited by the State in support of its claim of sovereign immunity here are distinguishable because they sound in tort rather than contract. In England, so far as we are able to determine, sovereign immunity has never existed in contract—only in tort. Illinois, by statute, has adopted the common law of England. (Ill. Rev.Stat. 1979, ch. 1, § 801.) And our 1970 constitution has abolished sovereign immunity "except as the General Assembly may provide by law." (Illinois Constitution 1970, Article 13, § 4.) Arguably in conflict with the above case and statutory authority and analysis is the statute which gives the Illinois Court of Claims exclusive jurisdiction to hear claims against the State which are founded upon contract. (Ill.Rev.Stat. 1979, ch. 37, § 439.8.) We find such attempted allocation of contract claims to be contrary to the statute authorizing the State to enter into binding contracts. Since it cannot be doubted that the General Assembly intends that the State have authority to enter into binding contracts, this statute assigning contract claims exclusively to the Court of Claims cannot be given effect.

The Illinois Court of Claims is, in reality, not a court at all. It most nearly resembles a committee of the General Assembly. It is an administrative agency. Its recommendations are not binding. Like any bill, both the General Assembly and the Governor must approve its awards before they are final. Its decisions are not appealable. It is not limited to legally admissible evidence or judicial rules of procedure.

More significantly than all of the above, however, is that the attempted allocation of jurisdiction to the Court of Claims is one-sided. That is to say, only claimants against the State must resort to the Court of Claims. The State may bring suit in the circuit court but may not be so sued.

That is the real inequity. That is the initial injustice. That is why the statute is fundamentally faulty. There is a lack of equality and of mutuality. The statute is not evenhanded. It attempts too much but does too little. Had the statute relegated both sides of contract actions involving the State to the Court of Claims as a mutual assignment applicable to both parties, a different argument would be presented, albeit still involving some substantial due process of law questions. However, that is not the situation that we have. Accordingly, the assignment attempted cannot be given efficacy. The contracting plaintiff is not to be denied his day in court merely because the State is a party to the contract. The decision of the trial court which dismissed the complaint is therefore reversed and the cause is remanded to the trial court for further proceedings.

REVERSED AND REMANDED.

STOUDER, J., concurs.

BARRY, J., dissents with opinion.

BARRY, Justice, dissenting.

The majority opinion relies upon the many cases holding that a state waives its right to governmental immunity when it binds itself in the same manner as an individual upon entering into a contract. (See, *e.g.*, *Grant Construction Co.* v. *Burns* (1968), 92 Idaho 408, 443 P.2d 1005, and the cases cited therein.) However, it is my view that such cases are not relevant to this appeal because Illinois abolished the common law doctrine of sovereign immunity and specifically limited the doctrine to immunities created

by statute. The Illinois Constitution of 1979, Article XIII, section 4, provides as follows:

> "Except as the General Assembly may provide by law, sovereign immunity in this State is abolished."

The General Assembly implemented this constitutional exception by reenacting the Court of Claims Act (Ill.Rev. State. 1979, ch. 37, par. 439.1, *et seq.*) which provides, in part, that the Court of Claims has exclusive jurisdiction to hear and determine all claims against the State "founded upon any contract entered into with the State of Illinois." (At par. 439.8.) Since the terms of the Constitution and the Court of Claims Act quite clearly limit plaintiff to the statutory remedy provided by the court of claims procedure, the sole issue to be determined in this case is whether the Court of Claims Act is constitutional. I believe the circuit court properly dismissed the complaint, not because of the common law doctrine of sovereign immunity, but by proper application of the statutory provision limiting plaintiff to a single remedy in an action against the State. The common law doctrine of sovereign immunity is not involved in this case, and neither is the claim that the State waived its immunity when it entered into a contract. The legislature has provided that a party contracting with the State has recourse only to the Court of Claims, and any one contracting with the State does so subject to that limitation. Therefore, those cases from other jurisdictions which found an implied consent to be sued where the state entered into an authorized contract are not applicable to the instant cause. Implied consent to be sued cannot be found where, as here, the legislature has expressly provided to the contrary.

Plaintiff also contends that the Court of Claims Act is unconstitutional upon several different grounds, including that it denies plaintiff the right of due process, right to a

jury trial, right to appeal, and the right to equal protection; that it takes property without just compensation; that it violates the separation of powers doctrine; and that it denies the right to a remedy for every injury. Most of these contentions have previously been considered by the Illinois Supreme Court in the case of *Seifert* v. *Standard Paving Co.* (1976), 64 Ill.2d 109, 355 N.E.2d 537, where six negligence actions were filed against the State by persons claiming to have been injured by the negligence of State employees or agents. Our Supreme Court held that the actions were barred by the Court of Claims Act and that the Act was constitutional. In its decision the Court ruled as follows: (1) that the Act did not violate the right to a trial by jury since such right does not apply to statutory proceedings unknown to the common law; (2) that neither equal protection nor due process were violated by the failure to provide a right to a jury trial, a right to appeal, or a right to subpoena or cross examine witnesses since Court of Claims proceedings are not judicial proceedings; and (3) that the separation of powers provision of the Illinois Constitution was not violated. Although the majority would distinguish *Seifert* on the ground that it involved tort actions, not contract, I think this is a distinction without a difference as to these constitutional issues.

Plaintiff argues that it was deprived of its property without due process of law by being denied a right to sue the State in a court of law where the State breached a contract. Plaintiff's position is in part based upon its further assertion that the Court of Claims is not a meaningful remedy and the majority agrees. However, this position presupposes a right to a judicial remedy for every wrong. Such right does not exist. The legislature has provided a non-judicial remedy for the orderly resolution

of claims against the State and that remedy is sufficient to meet the requirements of the Illinois and Federal Constitutions. As was noted in *Seifert*, the imposition of limitations upon statutory remedies does not infringe upon the constitutional right to a remedy. The speculation that a remedy may not do equity in every case is not grounds for invalidating the statute creating that remedy.

In a related argument, plaintiff suggests that the failure to permit a suit against the state for breach of contract amounts to a taking of private property without just compensation in violation of the Fifth Amendment of the United States Constitution. Again I believe that an adequate means of compensation is provided in such cases and that the constitution does not guarantee a judicial remedy.

Since plaintiff's contentions concerning the unconstitutionality of the Court of Claims Act were disposed by the Illinois Supreme Court's ruling in *Seifert*, I would affirm the order of the Circuit Court of Peoria County.

S. J. GROVES & SONS COMPANY, Appellee, v. THE STATE OF ILLINOIS, Appellant.

Illinois Supreme Court

Docket No. 56169—Agenda 66—May 1982.

JUSTICE CLARK delivered the opinion of the court:

This action was brought by S. J. Groves & Sons Company against the State of Illinois in the circuit court of Peoria County on February 23, 1981, for an alleged breach of contract. The trial court granted a motion to dismiss filed by the State, finding that it lacked subject matter jurisdiction to entertain this action. An appeal was filed with the appellate court, where the decision of the circuit court was reversed (103 Ill. App. 3d 538). The appellate court held that the State, in entering into a contract for highway construction, consented to be sued on that contract. We granted the defendant's motion for leave to appeal (73 Ill. 2d R. 315(a)). We now reverse the appellate court and find that the circuit court properly dismissed the action.

Section 4 of the article XIII of the 1970 Constitution abolished sovereign immunity. It provides: "Except as the General Assembly may provide by law, sovereign immunity in this State is abolished."

Pursuant to section 4 of article XIII the legislature enacted Public Act 77—1776 (Ill. Rev. Stat. 1979, ch. 127, par. 801), which provides that the State may not be made a defendant or a party in any court except as set forth in the Court of Claims Act (Ill. Rev. Stat. 1979, ch. 37, par. 439.1 *et seq.*). Public Act 77—1776 became effective on January 1, 1972, the same date section 4 of article XIII was to become effective (Ill. Const. 1970, Transition

Schedule, sec. 1(e)). As this court said in *Sass* v. *Kramer* (1978), 72 Ill. 2d 485, the legislature, "acting under the authority of the 1970 Constitution, specifically prohibited making the State of Illinois a defendant or party in any court." 72 Ill. 2d 485, 490.

Section 8(b) of the Court of Claims Act (Ill. Rev. Stat. 1979, ch. 37, par. 439.8(b)) gives the Court of Claims exclusive jurisdiction over contract claims brought against the State of Illinois:

> "The court shall have exclusive jurisdiction to hear and determine the following matters:
>
> * * *
>
> (b) All claims against the state founded upon any contract entered into with the State of Illinois." Ill. Rev. Stat. 1979, ch. 37, par. 439.8(b).

The roots of sovereign immunity lie in the common law of England. The State of Illinois adopted the common law of England as it existed "prior to the fourth year of James the First." (Ill. Rev. Stat. 1979, ch. 1, par. 801). In early English common law no action could be maintained against the Crown. (11 Halsbury's Laws of England par. 1401, at 743 (4th ed. 1976).) And as the United States Supreme Court pointed out in *Feres* v. *United States* (1950), 340 U.S. 135, 139, 95 L. Ed. 152, 157, 71 S. Ct. 153, 156:

> "While the political theory that the King could do no wrong was repudiated in America, a legal doctrine derived from it that the Crown is immune from any suit to which it has not consented was invoked on behalf of the Republic and applied by our courts as vigorously as it had been on behalf of the Crown."

No suit could be brought against the King because no court could have jurisdiction over him. 1 W. Blackstone, Commentaries 242. The reasoning behind the sovereign being exempt from suit is that "there can be no legal right

as against the authority that makes the law on which the right depends." (*Kawananakoa* v. *Polyblank* (1907), 205 U.S. 349, 353, 51 L. Ed. 834, 836, 27 S. Ct. 526, 527.) A petition of right developed for claims against the Crown as the sovereign began to assent to proceedings asserting legal or equitable rights in its own courts. (See 11 Halsbury's Laws of England par. 1411, at 747 (4th ed. 1976); 9 W. Holdsworth, A History of English Law 22 (1926).) While the petition could not compel the sovereign to satisfy a debt (*Thomas* v. *Queen* (1874), L.R. 10 Q.B. 31), the Bankers case in 1699 ((K.B. 1699) 87 Eng. Rep. 500) allowed for the satisfaction of contractual debt through the petition. (Bankers deprived of their credit had been granted annuities by King Charles II under a covenant binding the King and his successors. Because the annuities were not being paid the bankers sued by a petition of right for the debt owed them by the Crown.)

In the United States, sovereign immunity has been justified as a rule which embodies a policy that protects the State from interference in its performance of the functions of government and preserves its control over State coffers. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine,* 59 Harv. L. Rev. 1060, 1061 (1946).

Section 26 of article IV of the 1870 Illinois Constitution prevented the State from being subject to suit. Delegates to the constitutional convention expressed hesitancy at allowing the State to be exposed to an adversary proceeding in a court of law. (See 6 Record of Proceedings, Sixth Illinois Constitutional Convention 647 (hereinafter cited as Proceedings).) There was an expression among the delegates that an administrative hearing would protect the State against exaggerated claims while allowing for more

flexibility than would be available under the rules of procedure in a court of law. See 6 Proceedings 647.

A Commission of Claims was created in 1877 to hear claims against the State (1877 Ill. Laws 64) with awards to be presented to the General Assembly for a final determination. The Act of 1877 was amended and expanded in 1889 and repealed by the Court of Claims Act of 1903 (1903 Ill. Laws 140).

The court had exclusive jurisdiction to hear claims against the State, and the legislature would only appropriate to pay awards in those cases where such a recommendation was issued by the Court of Claims. (1903 Ill. Laws 140-42.) The Court of Claims Act of 1917 repealed the previous act, substituted the Secretary of State for the Auditor of Public Accounts as *ex officio* secretary, but again gave the court exclusive jurisdiction to rule upon claims against the State. 1917 Ill. Laws 325-27.

In 1945 the legislature passed the Court of Claims Act of 1945; it was amended in 1951 and remained in a similar form until after the adoption of the 1970 Constitution. Its operation had been analogous to that of the court created by the 1903 act. See 6 Proceedings 647-59; Novoselsky and Peterson, *State Immunity in Illinois: The Court of Claims,* 15 De Paul L. Rev. 340 (1965).

The comments of the General Government Committee of the 1970 constitutional convention that proposed language abolishing sovereign immunity, except as provided by the legislature, are indicative of a clear intent to put aside an anachronistic doctrine (6 Proceedings 640) while leaving the legislature with the opportunity to establish the procedure for processing any claims against the State. 6 Proceedings 636.

The plaintiff correctly points out that in a growing number of other jurisdictions the doctrine of sovereign immunity has been held not to be applicable to contracts: South Carolina: *Kinsey Construction Co.* v. *South Carolina Department of Mental Health* (1978), 272 S.C. 168, 249 S.E.2d 900; North Carolina: *Smith* v. *State* (1976), 289 N.C. 303, 222 S.E.2d 412; Oklahoma: *State Board of Public Affairs* v. *Principal Funding Corp.* (Okla. 1975), 542 P.2d 503; Iowa: *Kersten Co.* v. *Department of Social Services* (Iowa 1973), 207 N.W.2d 117; Missouri: *V. S. DiCarlo Construction Co.* v. *State* (Mo. 1972), 485 S.W.2d 52; New Jersey: *P.T.L. Construction Co.* v. *Department of Transportation* (1972), 60 N.J. 308, 288 A.2d 574; Idaho: *Grant Construction Co.* v. *Burns* (1968), 92 Idaho 408, 443 P.2d 1005; Delaware: *George & Lynch, Inc.* v. *State* (Del. 1964), 197 A.2d 734; California: *Souza & McCue Construction Co.* v. *Superior Court* (1962), 57 Cal. 2d 508, 370 P.2d 338, 20 Cal. Rptr. 634; Colorado: *Ace Flying Service, Inc.* v. *Colorado Department of Agriculture* (1957), 136 Colo. 19, 314 P.2d 278; Montana: *Meens* v. *State Board of Education* (1954), 127 Mont. 515, 267 P.2d 981; Nebraska: *Todd* v. *Board of Educational Lands & Funds* (1951), 154 Neb. 606, 48 N.W.2d 706; Michigan: *Hersey Gravel Co.* v. *State* (1943), 305 Mich. 333, 9 N.W.2d 567; Georgia: *Regents* v. *Blanton* (1934), 49 Ga. App. 602, 176 S.E. 673; Indiana: *Carr* v. *State ex rel. DuCoetlosquet* (1891), 127 Ind. 204, 26 N.E. 778. The rationale behind many of those decisions is that when a State voluntarily enters into a contractual relationship, it impliedly consents to be sued on that contract. In none of those jurisdictions, however, was immunity provided for by the legislature pursuant to the kind of express language of section 4 of article XIII of the 1970 Illinois Constitution.

The plaintiff argues that the General Assembly, in authorizing the State to enter into contracts for the construc-

tion of highways (Ill. Rev. Stat. 1979, ch. 121, par. 4—201.4), is consenting to be sued on those contracts. The plaintiff contracted with the Department of Transportation for highway construction work that called for earthmoving, grading, clearing and paving on the part of the plaintiff. The language on which it relies is that giving the Department of Transportation the power to "enter into contracts covering all matters and things incident to the location, relocation, construction, repair and maintenance of State highways." Ill. Rev. Stat. 1979, ch. 121, par. 4—201.4.

The plaintiff is correct in asserting that both parties to a contract must be bound for the agreement to be a valid contract. While there must be mutuality of obligation between contracting parties (*Welsh* v. *Jakstas* (1948), 401 Ill. 288; *Allied Delivery System, Inc.* v. *Illinois Commerce Com.* (1981), 93 Ill. App. 3d 656, 665; see also *Carter* v. *Kaskaskia Community Action Agency* (1974), 24 Ill. App. 3d 1056, 1059), it is only required to the extent that " 'both parties to an agreement are bound or neither is bound.' " (*Kraftco Corp.* v. *Koblus* (1971), 1 Ill. App. 3d 635, 638, quoting from 12 Ill. L. & Prac. *Contracts* sec. 7 (1955).) If the requirement of consideration has been met "mutuality of obligation is not essential." *Armstrong Paint & Varnish Works* v. *Continental Can Co.* (1921), 301 Ill. 102, 108. See Restatement (Second) of Contracts sec. 79 (1981).

The appellate court in *Garber* v. *Harris Trust & Savings Bank* realized that "where there is no other consideration for a contract, the mutual promises of the parties constitute the consideration, and these promises must be binding on both parties or the contract fails for want of consideration." (*Garber* v. *Harris Trust & Savings Bank* (1982), 104 Ill. App. 3d 675, 680.) There is, however, no requirement that parties to a contract have mutual remedies in the event of a breach. (5 A. Corbin, Contracts sec.

1179 (1964); Restatement (Second) of Contracts sec. 363, comment *c* (1981).) Because the State is obligated under a contract it signed does not mean that a remedy to institute a suit in a circuit court for a breach is implied.

Consent to be sued cannot be implied where there is an express statutory provision to the contrary. Whether the State is liable on a particular contract is a different question from whether the State is immune from being sued by an aggrieved party on that contract. It has been recognized that "[t]he rights and responsibilities of a state under an ordinary business contract are, with few exceptions, the same as those of individuals. Although it cannot be sued without its consent, the state, when making a contract with an individual, is liable for a breach of its agreement in like manner as an individual contractor. And while it may refuse to respond in damages, and leave a claimant without any remedy, as it may refuse to pay its bonds, the obligation remains." (72 Am. Jur. 2d *States, Territories, and Dependencies* sec. 88 (1974).) We agree with the defendant that the absence of a remedy that would be available to a contracting party in instituting a suit in the circuit courts does not demonstrate that the State is not bound by its contracts. The contractual obligation remains; it is the remedy for any recovery on a claim that is limited.

The plaintiff argues persuasively as to why the State of Illinois should not be allowed to invoke the doctrine of sovereign immunity when a private party asserts that the State has breached a contract. It is in essence the legislature—the body called upon to fund any awards—that is deciding through the Court of Claims the merits of the claims before it. The Court of Claims Act effectively sees to it that, while the State can proceed in circuit court against a private party, when a private party wants to

assert its contractual rights against the State, exclusive jurisdiction remains in the Court of Claims.

We agree with the plaintiff that a State government should be required to observe the same rules of conduct that it requires of its citizens. But it is the legislature's task to codify public policy; we refrain from undertaking such impermissible judicial legislation. See *People* v. *Chambers* (1976), 66 Ill. 2d 36, 44; 72 Am. Jur. *States, Territories, and Dependencies* secs. 73, 91 (1974).

In 1978 the Pennsylvania Supreme Court abolished the doctrine of sovereign immunity in a Pennsylvania tort case. (*Mayle* v. *Pennsylvania Department of Highways* (1978), 479 Pa. 384, 388 A.2d 709.) Article 1, section 11, of the Pennsylvania Constitution is similar to section 4 of article XIII of the Illinois Constitution in allowing suits brought against the State "in such manner as the legislature may by law direct." The majority of a sharply divided Pennsylvania Supreme Court held that article 1, section 11, did not preclude the court from abrogating the doctrine of sovereign immunity. The court said:

> "[T]he historic arguments * * * reflect obsolete legal thinking. * * *
>
> Once the 'errors of history, logic and policy' which underlie both sovereign immunity and the commonwealth's constitutional interpretation have been laid bare, we see no reason to perpetuate them." 479 Pa. 384, 399, 405, 388 A.2d 709, 716, 719.

While we acknowledge that there is no longer a King and agree that all of us, including the State, who enter into contracts should have an independent forum stand in judgment of contractual obligations, we see no reason for usurping a function of government that is not ours.

The language of Justice Pomeroy in his dissent from the holding that abrogated sovereign immunity by the

Pennsylvania Supreme Court in *Mayle* epitomizes our reasoning here:

> " 'When by their Constitution the people * * * have expressly delegated to the legislative branch of government the task of determining in what manner and in what court and in what cases the Commonwealth may be subjected to suit * * *, I fail to see how this Court can properly hold that it has a right to preempt this legislative function. A proposition that had its ancient origin in the common law of England and colonial America was elevated to constitutional status * * *. To ignore this development would be to warp the plain meaning of the Constitution to suit societal ends which now * * * the entire membership of this Court thinks are much to be desired. We may lament the legislative failure to correct before the present date an inequitable situation, but impatience should not cause us to upset the balance of power in our tripartite system of government by making the correction ourselves.' " (*Mayle* v. *Pennsylvania Department of Highways* (1978), 479 Pa. 384, 409, 388 A.2d 709, 721 (Pomeroy, J., dissenting), quoting from *Brown* v. *Commonwealth* (1973), 453 Pa. 566, 574-75, 305 A.2d 868, 873 (Pomeroy, J., concurring).)

It is not our province to take action to make the remedy more palatable for the aggrieved contracting party.

The plaintiff goes on to raise a number of other objections to the Court of Claims Act that plaintiff asserts rise to the level of violating both the United States and Illinois constitutions. However, the plaintiff prefaces its arguments with an admission that this court must first reach the conclusion that the State of Illinois can be sued in circuit court on a contractual claim by a private party. Having concluded that the State of Illinois cannot be sued on a contract in a circuit court, the thrust of the plaintiff's ancillary arguments is lost, since the foundation upon which they rest is missing.

Our most recent consideration of the Court of Claims Act was in *Seifert* v. *Standard Paving Co.* (1976), 64 Ill. 2d 109, where actions against the State, sounding in tort, were filed in the circuit court of Cook County alleging negligence on the part of agents or employees of the State. In upholding the dismissal of those complaints we found the Act does not violate the separation-of-powers provision of the Illinois Constitution; persons proceeding against the State are not entitled to a trial by jury, a right to appeal, or a right to subpoena or cross-examine witnesses. We believe that even though this action is in contract, those findings in *Seifert* are of equal force here.

If the inequities inherent in the doctrine of sovereign immunity are to be remedied, it is for the legislature and not this court to act. The complaint was properly dismissed.

Appellate court reversed:
circuit court affirmed.

56169

ILLINOIS SUPREME COURT

Juleann Hornyak, Clerk
Supreme Court Building
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January 28, 1983

Mr. Thomas C. Clark
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No. 56169—S.J. Groves & Sons Company, a Corp., appellee, vs. The State of Illinois, Acting through its Division of Highways of the Department of Transportation, appellant. Appeal, Appellate Court, Third District.

The Supreme Court today *DENIED* the Petition for Rehearing filed in the above entitled cause.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

IN THE SUPREME COURT OF THE
STATE OF ILLINOIS

S. J. GROVES & SONS COMPANY,	)	Filed April
	)	11, 1983
Appellant,	)	
	)	
vs.	)	No. 56169
	)	
THE STATE OF ILLINOIS,	)	
	)	
Appellee.	)	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given this 7th day of April, 1983, that appellant S. J. Groves & Sons Company, appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Illinois, entered in this action on January 28, 1983, denying the petition for rehearing. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V to the United States Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV (Section 1) to the United States Constitution provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

The Illinois Constitution, art. XIII, § 4 provides:

> Except as the General Assembly may provide by law, sovereign immunity in this State is abolished.

The Illinois Court of Claims Act, Ill. Rev. Stat. ch. 37, par. 439.8 (1979), provides in relevant part that:

> [The Illinois Court of Claims] shall have exclusive jurisdiction to hear and determine the following matters . . . .
>
> (b) All claims against the State founded upon any contract entered into with the State of Illinois.

Ill. Rev. Stat. ch. 127, par. 801 (1979):

> Except as provided in "AN ACT to create the Court of Claims, to prescribe its powers and duties, and to

> repeal AN ACT herein named," filed July 17, 1945, as amended, the State of Illinois shall not be made a defendant or party in any court.

Ill. Rev. Stat. ch. 121, par. 4-201.4 (1979), provides in relevant part that the Illinois Department of Transportation shall have the power:

> To enter into contracts covering all matters and things incident to the location, relocation, construction, repair and maintenance of State highways . . . .

Office-Supreme Court, U.S.
FILED
MAY 26 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1776

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

S. J. GROVES & SONS COMPANY, a corporation,
Appellant,

vs.

THE STATE OF ILLINOIS, Acting through its Division of Highways of the Department of Transportation,
Appellee.

On Appeal from the Supreme Court of Illinois

MOTION TO DISMISS

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QUESTION PRESENTED

Whether this appeal should be dismissed because no substantial federal question is presented?

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In The

Supreme Court of the United States

October Term, 1982

S. J. GROVES & SONS COMPANY, a corporation, *Appellant,* vs. **THE STATE OF ILLINOIS, Acting through its Division of Highways of the Department of Transportation,** *Appellee.*	**On Appeal from the Supreme Court of Illinois**

MOTION TO DISMISS

ARGUMENT

THIS APPEAL SHOULD BE DISMISSED BECAUSE NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

A.

The Illinois Supreme Court's Decision Rests Upon An Independent And Adequate State Ground.

There is no federal constitutional right to sue a state. Indeed, it has long been accepted without question that neither a state nor the United States could be sued as a

defendant in any court in this country without their consent. *Cunningham v. Macon & Brunswick Railroad*, 109 U.S. 446 (1883). In *Palmer v. State of Ohio*, 248 U.S. 32 (1918) this Court reiterated that "[t]he right of individuals to sue a state, in either federal or a state court, cannot be derived from the Constitution or laws of the United States. It can only come from the consent of the state." (*Id.* at 34). Implicitly recognizing that if Illinois retains its sovereign immunity no substantial federal question is presented in this case, plaintiff premises all of its constitutional arguments upon a purported "constitutional waiver" of immunity in the 1970 Illinois Constitution. However, the question of whether Illinois has waived its sovereign immunity—a point assumed by plaintiff without argument in its Jurisdictional Statement—is purely a question of State law. Since the Illinois Supreme Court has ruled that this State retains its sovereign immunity, no substantial federal question is presented.

Inexplicably, plaintiff has overlooked the fact that the 1970 Illinois Constitution authorized the General Assembly to adopt legislation retaining Illinois' immunity and such legislation was enacted. Article XIII, section 4 of the 1970 Illinois Constitution provides *"Except as the General Assembly may provide by law*, sovereign immunity in this State is abolished." (emphasis added) This provision became effective on January 1, 1972. *See*: Transition Schedule, § 1(e). Effective concurrently with this provision, the legislature adopted P.A. 77-1776, which mandates that the State shall never be made a defendant or party in any court, except as provided in the Court of Claims Act. Ill.Rev.Stat., 1981, ch. 127, par. 801. Thus, it is quite clear that Illinois retains its sovereign immunity under this legislation.

Moreover, the Illinois Supreme Court has frequently construed this provision of the Illinois Constitution and the Court of Claims Act and has held that Illinois retains its sovereign immunity under the 1970 Illinois Constitution. *See: Seifert v. Standard Paving Company*, 64 Ill.2d 109, 114, 355 N.E.2d 537 (1976); *Williams v. Medical Center Commission*, 60 Ill.2d 389, 394-95, 328 N.E.2d 1 (1975). It is well settled that the decision of the highest court in a state on a question of state law is conclusive. *Wilson v. North Carolina ex rel. Caldwell*, 169 U.S. 586, 18 S.Ct. 435 (1897).

Therefore, the Illinois Supreme Court's decision construing the Illinois Constitution as not effecting a waiver of this State's immunity is not subject to review by this Court, since it presents no federal question. *Cf. Douglas v. Noble*, 261 U.S. 165, 43 S.Ct. 303 (1922). Since the Illinois Supreme Court's decision in this case rests upon an independent and adequate state ground, this appeal must be dismissed. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566, 53 L.Ed.2d 965 (1977).

B.

Since Plaintiff Did Not Assert That The 1970 Illinois Constitution Abolished Sovereign Immunity In The Courts Below, This Point Is Waived And Should Not Be Considered.

The sole argument which plaintiff now makes—that sovereign immunity was abolished by the 1970 Illinois Constitution—is raised for the first time before this Court. It is true that plaintiff did argue below that the Court of Claims Act was unconstitutional because Illinois does not enjoy sovereign immunity. However, the reasons underlying plaintiff's argument in the courts below were: (1) there was no sovereign immunity at common law with

respect to contract actions, and (2) by authorizing state departments to enter into contracts the State had impliedly waived its immunity. These arguments were summarized by the plaintiff in its Reply Memorandum in the Circuit Court, where it stated,

> The preceding two arguments show that sovereign immunity does not apply to contracts signed by the State, both because sovereign immunity never applied to contracts at common law, and because the signing of a contract in and of itself is a business/proprietary act that waives sovereign immunity. Therefore, since sovereign immunity does not apply to contracts, the Illinois Court of Claims Act deprives Plaintiff of property without due process of law, in violation of both the Illinois and United States Constitutions, since it does not allow the plaintiff the right to sue for breach in a court of law.

The foregoing arguments were the only ones advanced by the plaintiff in support of its position in both the Illinois Appellate and Illinois Supreme Courts. Plaintiff has never before argued that sovereign immunity was abolished by the Illinois Constitution of 1970 and should not be permitted to raise this issue for the first time here. *See*: Appellant's Brief in *Groves v. State of Illinois*, No. 81-349 at pp. 11-12; Appellee's Brief in *Groves v. State of Illinois*, No. 56169 at p. 23.

This Court has consistently refused to decide federal constitutional issues which had never been raised, preserved, or passed upon by the courts below. *Tacon v. Arizona*, 410 U.S. 351, 352, 35 L.Ed.2d 346 (1973); *Moore v. Illinois*, 308 U.S. 786, 799, 33 L.Ed.2d 706 (1972); *Cardinale v. Louisiana*, 394 U.S. 437, 438, 22 L.Ed.2d 398 (1969). Since all of plaintiff's federal constitutional claims are premised upon a construction of the State Constitu-

tion which was not advanced in the State courts, this point was waived and cannot now be relied upon to reverse the decision of the Illinois Supreme Court.

This conclusion is supported not only by general principles of waiver, but also by principles of comity. In *Cardinale v. Louisiana, supra,* this Court explained,

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds (cit. omitted), they should be given the first opportunity to consider them.

394 U.S. 439.

If the plaintiff wanted the Illinois Supreme Court to reconsider its prior decisions in *Williams* and *Siefert,* it should have argued to that Court that these decisions were erroneous and should be overruled. Since plaintiff did not make this argument in the courts below, the point was waived and should not be considered by this Court.

CONCLUSION

For the reasons stated above, this appeal should be dismissed.

Respectfully submitted,

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BRIEF IN OPPOSITION TO MOTION TO DISMISS

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The State of Illinois misconstrues the issues raised in this appeal. First, the state incorrectly suggests that the opinion below, which rejected a claim that the Illinois Court of Claims Act violates the United States Constitution, can rest on an independent state ground. (Motion to Dismiss at 1-3.) The only independent state issue in this

case is the Illinois Supreme Court's ruling that the Court of Claims Act does not violate the Illinois Constitution. That ruling is not challenged by this appeal.

Secondly, the State of Illinois contends that Illinois' sovereign immunity disposes of this case. (Motion to Dismiss at 2.) However, the State's contention that sovereign immunity has been retained by Illinois flies in the face of the Act at issue here and the Illinois Supreme Court's explicit statements directly on point. The Illinois Court of Claims Act provides for resolution of disputes arising out of contracts with the State of Illinois and for the recovery of money against the State. The Constitution of Illinois waived sovereign immunity to allow the legislature to provide for these contested claims, as the Illinois Supreme Court stated in this case:

> The comments of the General Government Committee of the 1970 constitutional convention that proposed language abolishing sovereign immunity, except as provided by the legislature, are indicative of a clear intent to put aside an anachronistic doctrine . . . while leaving the legislature with the opportunity to establish the procedure for processing any claim against the State.

(Appendix to Petition at 14a.)

The issue raised by this case is whether the Illinois legislature, having been granted the power to establish a method for resolving claims against the state, can set up an administrative procedure which produces advisory opinions voidable by either the legislature or the governor (see Jurisdictional Statement at 4 n.2), and which is devoid of any judicial oversight. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327 (1893), and *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287, 291 (1920),

hold that the Taking and Due Process provision of the United States Constitution require that disputes involving a determination of just compensation must be resolved or reviewed by a judicial tribunal. The Illinois Court of Claims Act ignores *Monongahela's* requirement. The failure of the Illinois Supreme Court to recognize the denial of fundamental rights inherent in the Illinois claims scheme warrants plenary review by this Court.

CONCLUSION

For the reasons stated above and those stated in the Jurisdictional Statement probable jurisdiction should be noted.

Respectfully submitted,

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